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No. 94 - 1375

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

MICHAEL J. LITZENBERGER,
Petitioner

VS.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

I. Whether the suppression court correctly admitted into evidence the 25.7 pounds of marijuana seized from Petitioner, as the suppression court correctly followed this Court's unanimous decision in United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), which held that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists?

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COUNTER-STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 9, 1991, following a non-jury trial on stipulated testimony, before the Honorable Robert J. Shenkin, Petitioner, Michael Litzenberger, was found guilty of Possession with intent to deliver a controlled substance (marijuana),[1] Possession of a controlled substance (marijuana),[2] and Criminal conspiracy.[3]

Post-trial motions were denied, and on October 8, 1991, Judge Shenkin sentenced Petitioner to a term of imprisonment of not less than three years nor more than six years, plus a $15,000.00 fine, for Possession with intent to deliver marijuana, and eleven and one-half months to twenty-three months, for Criminal conspiracy, to run concurrent to the Possession with intent to deliver count.

Petitioner appealed from the judgment of sentence to the Superior Court of Pennsylvania, which affirmed the judgment of sentence by a memorandum opinion and order filed on July 13, 1992. Commonwealth v. Litzenberger, 423 Pa. Super. 635, 616 A.2d 716, No. 3284 Philadelphia 1991, J.A26043/92 (1992). A Petition for Allowance of Appeal, filed by Petitioner, was granted by the Supreme Court of Pennsylvania on May 7, 1993, and the instant case was docketed at No. 22 E.D. APPEAL DOCKET 1993. The grant of review was limited to three issues, all concerning the imposition by Judge Shenkin of the mandatory

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[1] 35 P.S. § 780-113(a)(30).

[2] 35 P.S. § 780-113(a)(16).

[3] 18 Pa.C.S.A. § 903(a) (1) and (2).

minimum sentence required by 18 Pa.C.S.A. § 7508(a)(1)(ii) (Supp. 1994) for Possession with intent to deliver 25.7 pounds of marijuana. The instant case was consolidated with Commonwealth v. Bell, No. 35 W.D. Appeal Docket 1992. The Supreme Court of Pennsylvania granted relief and the instant case was remanded to the trial court for resentencing. Commonwealth v. Bell, 537 Pa. 558, 645 A.2d 211 (1994), cert. denied, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, No. 94-1123 (02/21/95). On October 27, 1994, Judge Shenkin sentenced Petitioner to a term of imprisonment of not less than three years nor more than five years, plus a $15,000.00 fine, for Possession with intent to deliver marijuana, and eleven and one-half months to twenty-three months, for Criminal conspiracy, to run concurrent to the Possession with intent to deliver count.

B. FACTS OF THE CASE

On March 21, 1990, at approximately 6:15 p.m., a package was dropped off at a Post Office in Tucson, Arizona. The package was Express Mail addressed to Michael Litz, 1511 Green Lawn Road, Paoli, Pennsylvania, 19301, with a return address of Desert Concept, 2521 Ina Road, Tucson, Arizona, 85741. The Arizona authorities labeled this package as a "suspect" parcel.

This package fit the "profile" of suspicious packages for the following reasons: 1) It was Express Mail, which is used by drug dealers to speed up delivery; 2) It came from a portion of the country (Arizona) that is in close proximity to where marijuana is harvested (Mexico); 3) It was sent during the marijuana harvest season; 4) It was a very large package and very heavy (34 lbs.); 5) The package was heavily taped; 6) There was no East or West on the return address which would normally be associated with Ina Road; 7) There was no company listed as Desert Concept in the

telephone directory; 8) The return address on the package was fictitious.

On March 22, 1990, at 11:45 a.m., a drug dog named Bart sniffed the package. Although Bart did not "alert" to the package it was noted, by the Arizona authorities in their report and told to Postal Inspectors at the Bellmawr Post Office in New Jersey, that Bart "showed interest" in the package.

On March 22, 1990, at 11:30 p.m., the Arizona authorities notified Chuck McManus, a Postal Inspector at the Bellmawr Post Office in New Jersey, about this. On March 23, 1990, at 8:00 a.m., Jerry Piotrowicz, another Postal Inspector at the Bellmawr Post Office in New Jersey, was also notified about the package. The package was scheduled to leave Arizona on March 23, 1990 at 8:00 a.m. to travel through a transfer in Minneapolis and then arrive in Philadelphia on March 23, 1991, at 4:30 p.m. Inspector Piotrowicz waited at Philadelphia Airport, until 7:00 p.m., for the package to arrive. When the package did not arrive that evening, Inspector Piotrowicz asked the airport mail clerk to attempt to find out the possible location of the package. Inspector Piotrowicz was informed that the package was probably removed from the plane it was scheduled to arrive on and was probably waiting to be shipped out. Inspector Piotrowicz explained that this is not an unusual occurrence with packages, since mail of this sort has no priority on the airlines. As he no longer knew which flight the package was on, Inspector Piotrowicz asked the airport mail clerk to ship the package to his Bellmawr, New Jersey postal office when it arrived. When Inspector Piotrowicz arrived for work on March 24, 1990, at 7:30 a.m., the package was at his office.

During the course of its travel the tape had come loose on the package, as the package had been damaged. Based on Inspector Piotrowicz's experience in drug investigations, it was

obvious to him that the package smelled of marijuana. Inspector Piotrowicz contacted Camden County Sheriff Joseph Charles, who brought to the post office a reliable drug dog named Max to sniff the package. At approximately 8:30 - 9:00 a.m., Max alerted positively to the package, indicating the presence of marijuana.

On March 24, 1991, at approximately 9:00 a.m., Inspector Piotrowicz called the Easttown Police Department to inform them of the situation, and at approximately 10:00 a.m. he arrived at the Easttown Police Department with the package. At 10:30 a.m., there was a meeting at the Easttown Police Department, of police officers from the Tredyffrin and Easttown Police Departments, where all the officers had an opportunity to observe the package before a "controlled delivery" was made. Petitioner's property borders Tredyffin and Easttown Townships so that these various officers were brought in to establish surveillance in the two townships.

On March 24, 1990, at approximately 11:40 a.m., Joseph Hamlon, the postman who has delivered mail to Petitioner's residence for the past ten years, delivered the package to Petitioner, who was known by Mr. Hamlon. Petitioner signed for the package, using the name, which was on the package, Michael Litz.

While this package was being delivered, Officer DiMartini and an Assistant District Attorney were at District Justice Pomante's office waiting for the package to be delivered before they presented to District Justice Pomante, for his review, a search warrant they had prepared. After the package was delivered, Inspector Piotrowicz contacted Officer DiMartini at District Justice Pomante's office. Officer DiMartini then amended the search warrant to include the fact that a controlled delivery had been made.

At the time the search warrant was being submitted to the District Justice, Officer Lawrence Meoli, of the Tredyffrin Township Police Department, observed two males enter a car at Petitioner's residence and drive away. When the car drove past him, he observed on the back seat a large white package, which was a package that he had earlier seen at the Easttown Police Department. The package had been identified to him as a package that probably contained marijuana. Officer Meoli called Officer Vincent DiMartini, who instructed him to stop the car. Officer Meoli stopped the car, at approximately 12:00 p.m., and Petitioner was driving.

Herbert Friedman, a forensic scientist at the Lima Crime Lab, tested the contents of the package and concluded that it contained 25.7 pounds of marijuana. Detective Frank Martin, of the Chester County Detectives, concluded that in his expert opinion the 25.7 pounds of marijuana was possessed with the intent to deliver.

Petitioner gave a statement to Officer DiMartini. Petitioner stated that he met a man named Jerry a month before. Jerry said he would send a package to Petitioner's house, containing marijuana, and that Petitioner would receive $400.00 for receiving the package for Jerry.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The suppression court correctly admitted into evidence the 25.7 pounds of marijuana seized from Petitioner, as the suppression court correctly followed this Court's unanimous decision in United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), which held that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists.

The Petition for a Writ of Certiorari should be denied, as this area of law is well-settled. United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), the seminal case in this area, and its progeny, hold that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists. Neither the lower federal court nor the various state courts have had any difficulty in following this Court's unanimous decision in Van Leeuwen.

On April 9, 1991, at the conclusion of the suppression hearing, pursuant to Pa.R.C.P. 323 (i), Judge Shenkin made findings of fact and conclusions of law.[4] Judge Shenkin's findings of fact and conclusions of law were contained in an

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[4]When a motion to suppress has been filed, the burden is on the Commonwealth to establish by a preponderance of the evidence that the challenged evidence is admissible. An appellate court is required to determine whether the record supports the suppression court's factual findings, and whether the inferences and legal conclusions drawn by the suppression court from those findings are appropriate. Commonwealth v. Davis, 491 Pa. 363, 421 A.2d 179 (1980); Commonwealth v. Lawrence, 311 Pa. Super. 326, 457 A.2d 909 (1983).

Opinion and Order dated April 9, 1991. Judge Shenkin also wrote an Opinion in response to the mandate of Pa.R.A.P. 1925(a) dated December 5, 1991. Judge Shenkin's December 5, 1991 Opinion contained findings of fact and conclusions of law consistent with those outlined in his April 9, 1991 Opinion, however, they were more detailed. The Respondent, the Commonwealth of Pennsylvania, relies on Judge Shenkin's December 5, 1991 Opinion when referring to his findings of fact or conclusions of law.

Judge Shenkin properly admitted into evidence the 25.7 pounds of marijuana seized from the vehicle, in which petitioner was the driver. The record clearly supports his factual findings, and the inferences and legal conclusions drawn by Judge Shenkin are appropriate. The record supports Judge Shenkin's factual findings. Judge Shenkin correctly stated:

> The defendant contends that the detention of the package in Arizona and in New Jersey was illegal, and that the seizure after delivery was illegal because of the failure of the Commonwealth to have obtained search or arrest warrants.
>
> In considering the detention of the package by the Arizona authorities, we do not consider that the use of the magic word "profile" advances matters to any degree. The important consideration is the facts which make up the particular profile. So long as those facts <u>in their totality</u> give rise to a reasonable suspicion of criminal activity, the investigatory detention of the package is permissible. Thus, if the testimony were limited to the conclusion that the package "fit a profile," the stop would not be justified. If the testimony goes further and sets forth the facts which make up the profile, but those facts are not sufficient to give rise to a reasonable suspicion of criminal activity, still the stop would not be justified. But when, as here, the testimony sets forth the facts which cause the evidence to fit

the "profile" and those facts are sufficient to give rise to reasonable suspicion, then with or without the conclusion that the facts cause the package to fit a "profile", the investigatory detention is warranted. Thus, we are satisfied that the authorities in Arizona has the requisite legal grounds to detain the evidence in question and subject it to a sniff by a trained canine. State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976); State v. Graciano, 134 Ariz. 35, 653 P.2d 683 (1982). See also United States v. Sokolow, 490 U.S. 1, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989). Inspector Piotrowicz had knowledge of this same information, which was sufficient cause to permit him to direct the package to be routed to his office and to then investigate the package upon its arrival.

We have considered the possibility that the inconclusive result of the dog sniff in Arizona negated the reasonableness of the suspicion of Inspector Piotrowicz and have concluded that if did not. In other words, the information known to Inspector Piotrowicz was the same as that known to the Arizona authorities when they first detained the package except that Inspector Piotrowicz knew from his first contact with the case (which the Arizona authorities did not originally know) that the canine sniff conducted in Arizona was inconclusive. When a law enforcement officer has a reasonable suspicion based upon facts which he believes to be true and then discovers that one or more of those "facts" turns out to be untrue, the basis for holding the reasonable suspicion may in some cases be destroyed, Commonwealth v. Daniels, 410 Pa. Super. 275, 599 A.2d 988 (1991) but that will not invariably be the result. Each set of facts must be examined on a case by case basis to determine whether or not the remaining facts, considered in the context of the additional information that a fact (such as a key element of a profile) at first assumed to be true is found to be false, still give rise to a reasonable suspicion. In this case we are satisfied that at the time Inspector Piotrowicz decided to detain the package for investigation, the totality of the

> circumstances gave rise to a reasonable suspicion of criminal activity and justified his further examination of the package. Causing the package to be routed via his Bellmawr office does not cause such a removal from the stream of commerce so as to be in and of itself a seizure of the package, beyond the limits of investigation permitted on the basis of a reasonable suspicion. Of course, once Inspector Piotrowicz personally observed the package and smelled the odor emanating from it, the level of his suspicions naturally rose. The positive alert given by Max, the trained drug sniffing canine, served to increase that suspicion to the point where the facts then known to Inspector Piotrowicz constituted probable cause to obtain a warrant to seize and search the package.

December 5, 1991 Opinion of the Honorable Robert J. Shenkin at 5-7 (footnotes omitted) (emphasis in original).

This area of law is well-settled. United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), the seminal case in this area, and its progeny, hold that Postal authorities may seize and detain a package if they have a reasonable and articulable suspicion that criminal activity exists. In Van Leeuwen, the "reasonable suspicion" was as follows, that Van Leeuwen dropped off two 12 pound packages at a post office in Mount Vernon, Washington, a town near the Canadian border. One package was addressed to California the other to Tennessee. A police officer noticed that the return address on the packages was a vacant housing area at a nearby college, while Van Leeuwen's license plates were from Canada.

In Van Leeuwen, Mr. Justice Douglas, writing for an unanimous Court stated:

> The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of

> respondent who made the mailings in this border town certainly justified detention, without a warrant, while an investigation was made... The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically - and it is theory only that respondent has on his side - detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment.

Id. at 252, 90 S.Ct. at 1032, 25 L.Ed.2d at 285.

In the instant case, Postal authorities had a reasonable and articulable suspicion that criminal activity existed. This package fit the "profile" of suspicious packages as outlined above. The argument that this "reasonable suspicion" was eliminated by the failure of Bart, the drug dog, to alert to the package in Arizona is not persuasive for the following reasons. Bart did not ignore the package in Arizona, he "showed interest" in the package. Consequently, Bart's reaction to the package does not support a negative inference that drugs were not in the package, as argued by Petitioner. Consequently, Judge Shenkin, as fact finder correctly rejected this inference. Moreover, all the factors that pointed to the fact that this package contained drugs still existed regardless of how Bart reacted to the package. The circumstances surrounding the package in the case at bar are at least as suspicious as those in Van Leeuwen.

In Van Leeuwen one of the packages was detained for 29 hours after its mailing before a search warrant was obtained. This Court specifically declined to set time limits on the detention of a package, instead making the issue the reasonableness of the detention. This Court stated:

> The rule of our decision certainly is not that first-class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that the facts of this case - the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle - a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant.

Id. at 253, 90 S.Ct. at 1032-1033, 25 L.Ed.2d at 286.

In Van Leeuwen this Court did not establish or apply a bright line rule for time limits on the detention of a package, instead making the issue the reasonableness of the detention, on a case by case basis. Several subsequent cases have held that detentions were reasonable in factual situations similar to the case at bar. These cases also demonstrated that neither the lower federal court nor the various state courts have had any difficulty in following this Court's unanimous decision in Van Leeuwen.

In United States v. Mayomi, 873 F.2d 1049 (7th Cir. 1989), envelopes that were believed to contain heroin were received by a private mailbox service, on Saturday, July 12, 1988. An FBI Agent told the service to hold the envelopes over the weekend until the following Monday. On Monday, July 14, 1988, a dog sniff was performed, the dog alerted positively to the envelopes, and a search warrant was obtained. The United States Court of Appeals for the Seventh Circuit stated:

> With regard to the two letters received on July 12, it is important to note that the letters were detained only over the weekend and for the sole purpose of subjecting them to a canine sniff test by two specially trained dogs that had detected the presence of heroin on prior occasions.
>
> We therefore hold that under the facts of this case the length of time the envelopes were detained comports with the standards set forth in United States v. Van Leeuwen, [397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970)] and United States v. Place, [462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983)]. The detention of the defendant's mail for a period of forty-eight hours in order to confirm [the FBI's] suspicion that the three envelopes contained heroin did not invade his rights under the Fourth Amendment. We emphasize as did the Supreme Court in Van Leeuwen, that the significant Fourth Amendment interest was in the privacy of this mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Id. at 1054 (footnotes omitted).

In State v. Stanphill, 53 Wash. App. 623, 769 P.2d 861 (1989), the package in question was supposed to be delivered in one day since it was Express Mail. The mail was sent to the Post Office on Thursday, July 2, 1987. A canine sniff was performed that day and the dog alerted positively to the package. The package was detained until Monday, July 6, 1987 by Postal authorities until a federal search warrant could be obtained. In rejecting Stanphill's claim that this four day delay was unreasonable, the Washington Court stated: "Given the probable cause provided by the canine sniff, the minor level of intrusiveness in detaining the package, the distance between Walla Walla and Spokane, and the intervening holiday, we find the delay until Monday morning was reasonable." Id. at ___, 769 P.2d at 865.

In United States v. Aldaz, 921 F.2d 227 (9th Cir. 1990), the United States Court of Appeals for the Ninth Circuit found the following facts sufficient to constitute a "reasonable suspicion" that contraband was in various packages, thus permitting the police to detain the packages for the purpose of a canine sniff. A Postal Inspector in one city in Alaska informed a second Postal Inspector that Aldaz, according to police, was a suspected drug dealer. Aldaz had no job, yet he had money. Three packages mailed by Aldaz were mailed in a suspicious manner. Aldaz sent a package with his girlfriend's return address while she sat outside in a car. Aldaz's girlfriend then came in to the Post Office and mailed a package with the Aldaz's return address while he sat in the car.

In Aldaz, the court held that a six day detention of one package, and a three day detention of three additional packages, mailed by Aldaz who was suspected of using the mail for drug trafficking, did not violate the Fourth Amendment. Most of the delays were beyond the government's control, and the remaining delays, including five hours between a canine sniff and the execution of a search warrant, were not unreasonable. In Aldaz, Aldaz mailed a package via express delivery on Saturday, October 8, 1988. Because of the mail schedule, that package did not leave the Post Office until October 11, 1988. On October 11, 1988, Aldaz mailed three additional packages. These packages did not arrive on the scheduled flight, as it was canceled. Consequently, the Postal Inspector did not know on which flight the packages would arrive. The packages were sent on a substitute flight, and did not arrive until 1:00 a.m., on October 13, 1988. The Postal Inspector did not receive the packages until 4:28 p.m., on October 13, 1988. The Postal Inspector immediately attempted to arrange a drug detection canine sniff, but no dogs were available. On October 14, 1988, at 9:45 a.m., a reliable drug dog gave a positive alert on all four packages. The necessary paperwork was prepared and search warrants were obtained, at 3:05 p.m., for the

three packages mailed on October 11, 1988. A search of the three packages revealed marijuana.

In Aldaz, the delay was due to several factors: 1) The package was not on its scheduled flight, consequently, the Postal Inspector did not know what flight to wait for; 2) When the package arrived it was in the evening hours and the Postal Inspector could not obtain a drug dog; 3) It took five hours for the Postal Inspector to obtain a search warrant after the drug dog had alerted positively.

In Aldaz, the Ninth Circuit applying United States v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970), determined that the detention was reasonable. The court rejected arguments that prior Ninth Circuit cases, United States v. Hillison, 733 F.2d 692 (9th Cir. 1984) and United States v. Dass, 849 F.2d 414 (9th Cir. 1988), had interpreted Van Leeuwen as creating an outer boundary of 29 hours for detentions. The court held that the test under Van Leeuwen is whether the detention of the package is reasonable.

The length of the detention of the package in the case at bar was reasonable under the circumstances, as it was in Van Leeuwen, Mayomi, Stanphill, and Aldaz. On March 21, 1990, at approximately 6:15 p.m., a package was dropped off at a Post Office in Tucson, Arizona. The Arizona authorities labeled this package as a "suspect" parcel, as it fit the "profile" of suspicious packages. On March 22, 1990, at 11:45 a.m., a drug dog named Bart sniffed the package.[5] Although Bart did not "alert" to the package, he "showed interest" in it. On March 22, 1990, at 11:30

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[5]Petitioner does not contend that the dog sniff of the package in Arizona was illegal. Petitioner only challenges the subsequent detention of the package.

p.m., and again on March 23, 1990, at 8:00 a.m., Postal Inspectors at the Bellmawr Post Office in New Jersey, were also notified about the package.

The package was scheduled to leave Arizona on March 23, 1990 at 8:00 a.m. to travel through a transfer in Minneapolis and then arrive in Philadelphia on March 23, 1991, at 4:30 p.m. Inspector Piotrowicz waited at Philadelphia Airport until 7:00 p.m. for the package to arrive.

When the package did not arrive that evening, Inspector Piotrowicz asked the airport mail clerk to attempt to find out the possible location of the package. Inspector Piotrowicz was informed that the package was probably removed from the plane it was scheduled to arrive on and was probably waiting to be shipped out. Inspector Piotrowicz explained, this is not an unusual occurrence with packages, since mail of this sort has no priority on the airlines. All individuals who mail packages, even those using the mail for drug trafficking, are subject to the rules of the airlines. As he no longer knew which flight the package was on, Inspector Piotrowicz asked the airport mail clerk to ship the package to his Bellmawr, New Jersey postal office when it arrived. Inspector Piotrowicz, like the Postal Inspector in Aldaz, did not know when the package would arrive.

The only re-routing of the package by law enforcement was when it was taken, sometime in the evening of March 23, 1990 or early morning of March 24, 1990, to Inspector Piotrowicz's office. When Inspector Piotrowicz arrived for work on March 24, 1990, at 7:30 a.m., the package was at his office. During the course of its travel the tape had come loose on the package, as the package had been damaged. Based on Inspector Piotrowicz's experience in drug investigations, it was obvious to him that the package smelled of marijuana. Inspector Piotrowicz immediately contacted Camden County Sheriff Joseph Charles,

who brought to the post office a reliable drug dog named Max to sniff the package.[6] At approximately 8:30 - 9:00 a.m., Max alerted positively to the package, indicating the presence of marijuana.

On March 24, 1991, at approximately 9:00 a.m., Inspector Piotrowicz called the Easttown Police Department to inform them of the situation, and at approximately 10:00 a.m. he arrived at the Easttown Police Department with the package. At 10:30 a.m., there was a meeting at the Easttown Police Department, of police officers from the Tredyffrin and Easttown Police Departments, where all the officers had an opportunity to observe the package before a "controlled delivery" was made.

On March 24, 1990, at approximately 11:40 a.m., the package was delivered to Petitioner. The difference in time from the dog sniff at 9:00 a.m., the controlled delivery made at approximately 11:40 a.m., and the ultimate search of the package at approximately 12:00 p.m., is much less than the five hours it took the police to do the same in Aldaz.

While this package was being delivered, Officer DiMartini and an Assistant District Attorney were at the District Justice's office waiting for the package to be delivered before they presented to the District Justice for review a search warrant they had prepared. After the package was delivered, Inspector Piotrowicz contacted Officer DiMartini at District Justice's office. Officer DiMartini then amended the search warrant to include the fact that a controlled delivery had been made. Before the search

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[6]Petitioner does not contend that the dog sniff of the package in New Jersey was illegal. Petitioner only challenges the detention and subsequent re-routing of the package to Inspector Piotrowicz's office in New Jersey.

warrant could be obtained, Petitioner forced the police to make a warrantless arrest, based on exigent circumstances, by attempting to leave with the package.

The detention of this package was not unreasonable. Most of the delay stemmed from the package being removed from the plane it was scheduled to arrive on, since mail of this sort has no priority on the airlines. This delay was not the result of any state action. Any remaining delays were not unreasonable under the circumstances.

In addition to his federal constitutional arguments, Petitioner cites federal postal regulations in support of his argument. However, Petitioner concedes that this argument was not presented to any of the courts below. Petitioner states; "The federal statutory issue was not raised, but on the facts of this case does not call for any different analysis." Petition for Writ of Certiorari at 11. Consequently, as this argument was not raised below, it cannot support a grant of certiorari. This Court does not decide questions not raised in the lower court. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

CONCLUSION

WHEREFORE, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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